

Caterpillar, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Locals 119, 145, 751, 786, 974, 1415, and 2096. Case 33–CA–9876–3

October 31, 2000

DECISION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 19, 1998, the National Labor Relations Board issued the attached Order granting the parties' joint motion to vacate the remand. The Order provided, *inter alia*, that upon union ratification of the proposed new central agreement described in the joint motion, the decisions and orders listed in the joint motion¹ would be immediately vacated. Thereafter, by letter dated March 23, 1998, the Union notified the Board that such ratification had occurred. Accordingly, by the terms of the Board's March 19, 1998 Order, those decisions have been vacated.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Because questions are often raised regarding the effect of such a vacatur, however, we wish to make clear the significance we attribute to an order to vacate when granted, as here, pursuant to a settlement, rather than as the result of a determination on the merits that the vacated decision was in error. In the case of the latter, the vacated decision is eliminated for all purposes, including precedential effect.² When we vacate a decision pursuant to a settlement, however, unless we indicate otherwise in our order vacating, it is vacated only insofar as there is no longer a court-enforceable order in the case and the decision has no preclusive effect on the parties (i.e., it will have no res judicata or collateral estoppel effect against the parties).³ Likewise, because the Board's findings of fact and conclusions of law with respect to the parties have been vacated, those findings and conclusions may not be used to establish a proclivity to violate the Act, unless, of course, the parties to the settlement agree

that they may be so used. There will remain a published decision in the case, and that decision may be cited as controlling precedent with respect to the legal analysis therein. See *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 fn. 3 (1997), where the Board majority cited and overruled *Highland Yarn Mills*, 310 NLRB 644 (1993), which was vacated as moot at 315 NLRB 1169 (1994), following a non-Board settlement. We follow this policy because we agree with the United States Court of Appeals for the Seventh Circuit that a judicial tribunal "ought not allow the social value of [a] precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement." *Matter of Memorial Hospital of Iowa County*, 862 F.2d 1299, 1302 (7th Cir. 1988).⁴

We are aware that the courts appear to take the view that the only way to preserve a case as controlling precedent is to deny the application for vacatur, and will generally give only persuasive, rather than controlling precedential weight to the legal analysis in vacated decisions. See Resnick, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471, 1473–1474, 1507–1511 (1994); and Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 629–630 (1991) (citing cases). However, the Board generally has not chosen to follow the same practice with respect to its own decisions. See *Cresleigh*, *supra*. See also *Central Illinois Public Service Co.*, 326 NLRB 928, 929 fn. 8 (1998) (citing two of the vacated *Caterpillar* decisions); *CBS Corp.*, 326 NLRB 861 fn. 5 (1998); and *Beverly California Corp.*, 326 NLRB 153, 158 fn. 16 (1998) (citing *Chicago Tribune Co.*, 318 NLRB 920 (1995), which was vacated pursuant to a settlement by unpublished order dated September 30, 1996); and *Eby-Brown Co.*, 328 NLRB 496 (1999) (citing *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995), vacated pursuant to a settlement by unpublished order dated September 30, 1996).⁵ We agree with and reaffirm the Board's past practice in this regard.⁶

¹ *Caterpillar, Inc.*, 321 NLRB 1130 (1996); *Caterpillar, Inc.*, 321 NLRB 1178 (1996); *Caterpillar, Inc.*, 322 NLRB 674 (1996); *Caterpillar, Inc.*, 322 NLRB 690 (1996), clarified 322 NLRB 920 (1997); and *Caterpillar, Inc.*, 324 NLRB 201 (1997).

² Thus, in *Government Employees Local 888 (Bayley-Seton Hospital)*, 323 NLRB 717, 722 (1997), when the Board vacated its earlier decision published at 308 NLRB 646 (1992), the earlier decision was vacated for all purposes, including its availability for citation as Board precedent.

³ In the instant case, the Board's March 19, 1998 Order vacating pursuant to the parties' settlement contained no limitation on the continued precedential authority of the vacated decisions with respect to the legal analysis contained therein.

⁴ Member Hurtgen would follow the court rule, i.e., a vacated opinion has persuasive, but not controlling, authority. He does not think it prudent to have one rule for federal courts and another for the NLRB. He also notes that *Matter of Memorial Hospital*, *supra*, is not to the contrary. The court there said that a vacated decision "does not vanish or vacate, although such an order clouds and diminishes the significance of the holding."

⁵ But cf. *Dorsey Trailers*, 327 NLRB 835 (1999) (noting vacatur of *Elliott Turbomachinery*, *supra*, and "placing no reliance upon" it).

⁶ In some cases, however, the Board has failed to note the vacatur following its citation to the vacated decision. We believe the better practice is to include a reference to the vacatur in the citation.

APPENDIX

ORDER GRANTING JOINT MOTION TO VACATE
DECISIONS AND ORDERS AND TO REMAND

Upon consideration of the Joint Motion of Caterpillar, Inc., International Union, UAW and its Local Unions 119, 145, 751, 786, 974, 1415, and 2096 and the Acting General Counsel of the National Labor Relations Board:

IT IS HEREBY ORDERED that the Board, pursuant to Section 102.50 of its Rules and Regulations, takes jurisdiction over those complaints currently pending before Administrative Law Judges Gross, Rose, Sherman, and Wagman, as listed on Exhibit A to the parties' motion:

IT IS FURTHER ORDERED that, upon union ratification of the proposed new central agreement described in the joint motion and for the reasons stated therein, the decisions and orders and recommended decisions and orders listed in the parties' joint motion, subject to the exclusions specifically noted in the joint motion for Cases 33-CA-10161 and 33-CA-10984, will

be immediately vacated and, along with the complaints listed on Exhibit A to the parties' joint motion, remanded to the Acting General Counsel for purposes of approving the request of Caterpillar and the Union that all such charges, and all other unfair labor practice charges filed by Caterpillar and the Union against each other, be withdrawn upon union ratification of the proposed new central agreement;

IT IS FURTHER ORDERED that, upon notification from the parties to the Executive Secretary that the parties have resolved the backpay issues remaining in Case 33-CA-10161 and/or that compliance has been effectuated in that matter, the Decision and Order in Case 33-CA-10161, without further action by the Board, will be immediately vacated and the underlying case will be remanded to the Acting General Counsel for further action in accordance with the parties' Joint Motion. ~~IT IS~~ FURTHER ORDERED that if the Union declares the proposed new central agreement is not ratified, the Board's action in granting this Order shall thereby be rescinded and this ORDER shall thereby be null, void and of no effect.